U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON. D.C.

DATE: November 1, 1993
CASE NO. 90-JTP-5

IN THE MATTER OF

TEXAS DEPARTMENT OF COMMERCE,

COMPLAINANT,

and

FORT WORTH CONSORTIUM,

COMPLAINANT/INTERVENOR,

v.

U.S. DEPARTMENT OF LABOR,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Job Training Partnership Act [of 1982] (JTPA or the Act), 29 U.S.C. §§ 1501-1791 (1988), and the regulations issued thereunder at 20 C.F.R. Part 629 (1992). The Texas Department of Commerce (TDOC or state), the state's administrative agency for its JTPA grant, and the City of Fort Worth, the Service Delivery Area (SDA) agency for five cities in Tarrant County, Texas, through the Fort Worth Consortium and its administrative agency, the Fort Worth Working Connection (FWWC), appealed the Administrative Law Judge's (ALJ) March 16, 1993, Decision and Order (D. and 0.) which affirmed the Grant Officer's disallowance of $385,933 of administrative costs improperly

charged to training costs. The Secretary asserted jurisdiction on May 7, 1993.

BACKGROUND

Section 108 of the Job Training Partnership Act specifically limits the expenditure of funds available to a service delivery area for the administration of its JTPA title II programs to a maximum of 15%. 29 U.S.C. § 1518. To comply with the limitations on certain costs in the Act, including the limitation on administrative costs, the implementing regulations at 20 C.F.R. § 629.38(a) identify allowable cost categories for title II programs as: training, administration, and participant support, and require that costs be allocated to a particular cost category to the extent that benefits are received by that category.

The regulations provide, however, that costs which are billed as a single unit charge, (generally characterized as fixed unit price, performance-based contracts), [1/] do not have to be allocated or prorated between the several cost categories, but can be charged entirely to training, provided the agreements include certain required conditions. 20 C.F.R. § 629.38(e)(2). These requirements are that the agreement:

(i) Is for training under title II or for retraining

[1/] Fixed unit cost, performance-based contracts provide that the contractor will be paid a specific negotiated cost for each participant who completed training and was placed in unsubsidized employment. The fixed unit cost was not allocated by cost category and the contractor assumed the risk of non-payment for any participant who failed to complete training or was not placed in unsubsidized employment.

under title III,...:

(ii) Is fixed unit price: and

(iii)(A) Stipulates that full payment for the full unit price will be made only upon completion of the training by a participant and the placement of the participant into unsubsidized employment in the occupation trained for and at not less than the wage specified in the agreement: ... (emphasis supplied). Id.

The Department of Labor's Employment and Training Administration (ETA) did not provide any proposed guidance to JTPA grantees concerning fixed unit cost, performance-based contracts until November 1987. After a six month review of

A. contracting practices, ETA issued Training and Employment Guidance Letter (TEGL) No. 3-87. [2/] The TEGL described a series of problems identified with fixed unit price contracts, as well as various types of "problem contracts", and requested that the states and SDAs examine their local contracting practices in this regard. ETA published a Notice in the Federal Register on March 11, 1988, as a followup to the TEGL, soliciting comments concerning policy considerations in administering JTPA regulations pertaining to fixed unit cost contracts. 53 Fed. Reg. 7,989 (1988). ETA published another request for comments on August 8, 1988, regarding its proposed "official interpretation of the requirements for writing acceptable fixed unit price,

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[2/] Training and Employment Guidance Letter (TEGL) No. 3-87, Nov. 18, 1987, "Mounting Concerns Regarding 'Problem Contracts' Written under 20 CFR 629.38(e)(2)".

performance-based contracts which conform to the cost classification waiver provisions of 20 CFR 629.38(e)(2) of the Job Training Partnership Act (JTPA) regulations, and other pertinent sections of JTPA and the JTPA regulations". 53 Fed. Reg. 29,961 (1988). [3/] The Department's official interpretation of these requirements was published in the Federal Register on March 13, 1989, with an effective date of July 1, 1989. 54 Fed. Reg. 10,459 (1989).

The Department of Labor's Office of the Inspector General audited the Fort Worth Consortium's JTPA programs for Program Years 1985-1987, covering the calendar period July 1, 1986 through June 30, 1988. The audit revealed that FWWC had entered into a series of ten contracts with the Fort Worth Independent School District, the Texas Employment Commission and Career Works, a private non-profit company, characterized as "vendors". These vendors were to act on behalf of FWWC soliciting training and employment opportunities for JTPA eligible participants by local employers. In addition, the vendors provided pre-employment assessment and employment placement services for the participants, but not specific occupational training. Employment and on-the-job training (OJT) in employment was to be provided by others, (the actual employers of the participants), under

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[3/] A full discussion of the background concerning the development of the Department's official policy interpretation can be found at Job Trainina Partnershin Act: Requirements for Accentable Fixed Unit Price, Performance-Based Contracts Written Under 20 CFR 629.38(e) (2); Notice: request for comments. 53 Fed. Reg. 29,961, 29,962 (1988).

separate contracts with FWWC, although the vendors had certain responsibilities once a participant was placed, such as monitoring the work sites and assisting the OJT employers with record management. The vendors were paid specific "benchmark" fees as each participant went through the pre-employment process, and as well as a fee if the participant was placed in an employment situation, whether additional on-the-job training was required or not. In the latter case, the employment was designated as a "direct placement'@. D. and 0. at 8-10.

On September 25, 1989, the Grant Officer issued a Final Determination which disallowed, inter alia, $385,933 as misclassified administrative costs charged as training costs under the ten fixed unit cost contracts. The Grant Officer's Finding 3 determined that the ten contracts "were not specifically for training nor were payments under the contracts contingent upon completion of training and the placement of the participants. Thus, the contracts do not meet the requirements of 29 CFR 629.38(e)(2)." Administrative File (A.F.) at 14-15. The presiding ALJ determined that although the activities provided by the vendors under the ten questioned contracts conformed to the definition for "training" in the Department's official policy interpretation issued in March 1989, D. and 0. at 19, the contracts did not meet the requirements of 20 C.F.R. § 629.38(e)(2), and were correctly disallowed by the Grant Officer. D. and 0. at 22.

DISCUSSION

The regulation pertaining to agreements incorporating single unit charges that do not have to be allocated or prorated among the several cost categories requires that the agreements must be for training and placement of the participants into unsubsidized employment in the occupation trained for. The agreements in question between FWWC and the vendors required other parties, namely the employers of the participants, to provide the requisite job training and placement in unsubsidized employment, therefore the agreements do not conform to the requirements of 20 C.F.R. § 629.38(e)(2). The ALJ's affirmation of the Grant Officer's disallowance of such costs as misapplied as training costs was correct. Although the vendors may have provided a necessary augmentation of FWWC's program responsibilities, these activities were essentially administrative in nature and must be categorized as such. The costs were disallowed by the Grant Officer because they were in excess of the statutory limit for administrative costs.

Although the Labor Department failed to provide dispositive direction to JTPA grantees as to what might be considered acceptable contract provisions to conform to the cost classification waiver of § 629.38(e)(2), the plain meanings of the terms, albeit restrictive in application, are clear. Subsection 629.38(e)(2) had been transferred nearly intact from the Comprehensive Employment and Training Act (CETA) regulations

at 20 C.F.R. § 676.41-2(b)(1990). [4] The CETA regulation permitting fixed unit cost, performance-based contracts had been administratively adopted as a means to provide flexibility to certain training providers to foster more intensive skill training to meet known labor market needs for higher paying entry level jobs.

The Department assumed, wrongly as it turned out, that this type of performance-based contracting would continue under JTPA as it had under CETA, developing additional high quality skills training. Instead, Departmental officials recognized that the use of fixed unit cost contracting had become nearly pervasive throughout the JTPA system. It was evident that some grantees realized that costs which would otherwise be categorized as administrative costs and therefore subject to statutory and regulatory expenditure limits, could be folded into the training cost category under fixed unit costs contracts, and thereby avoid the restrictive administrative cost limits. Although

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[4] 20 C.F.R. § 676.41-2 entitled [a]llocation of fixed unit charge. provides:

> (b) Costs which are billed as a single unit charge do not have to be allocated or prorated among the several cost categories but may be charged entirely to training when the agreement:
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> (1) Is for classroom training;
> (2) Is fixed unit priced; and
> (3) Stipulates that full payment for the full unit price will be made only upon completion of training by a participant and placement of the participant into unsubsidized employment in the occupation trained for and at not less than the wage specified in the agreement
>
> (emphasis supplied).

The CETA regulations were last published in the C.F.R in 1990.

Departmental policy makers were determined not to over-regulate the JTPA program, and declined to define key terms in the TEGL, grantees who disregarded the specific requirements of the regulations, particularly when the regulation delineates an exception to a general program requirement, do so at their peril. The state's and FWWC's contention that they should be held harmless for the misallocation of administrative expenditures because of the Department's failure to redefine the meaning of the word "training" in 20 C.F.R. § 629.38(e)(2) is not persuasive, for the language of the regulations is clear.

Although the official policy interpretation concerning § 629.38(e)(2) contracts includes many of the vendors' activities as allowable training costs for appropriate training contractors, it specifically excludes tiered administrative structures, which involve intermediary administrative entities such as the vendors in this case, from utilizing fixed unit cost contracts. If such an entity is needed, its costs are to be charged to the administrative cost category. 54 Fed. Reg. at 10,467.

The state contends that given the ALJ's determination of a contractual linkage between the vendors' contracts and the employers, some of the disallowed costs should be allowed on behalf of trainees who successfully completed training and were placed in unsubsidized employment. TDOC's Initial Brief at 4. I note that although the ALJ's finding appears to be contrary to the official policy concerning the exception of tiered arrangements using fixed unit cost contracts, the Department did

not except to the ALJ's finding "that the contracts entered into by the State and the FWWC and the subcontractors [the vendors] were for 'training' as it was commonly understood pre and post official policy interpretation by the U.S. Department of Labor" D. and 0. at 19. The Grant Officer appears to be amenable to this claim: "This does not mean that no costs under these contracts can be charged to the training cost category. There are certainly costs of activities that are appropriate and allowable charges to the training cost categories". Response Brief at 6. However, the Grant Officer's Final Determination at 6, A.F. at 15, states: "[w]hile the documents do show that some activities under the contracts were properly chargeable to training under 20 CFR 629,38(e)(l), these are not the costs in question. The auditors already made a determination that approximately $956,000 of the $1,482,000 were appropriately charged to training". It is unclear from the record before me whether all of the costs for participants who completed their training and were placed in unsubsidized employment were credited before the total of disallowed costs was determined, which is the implication of the language of the Final Determination, or if some costs might yet be considered "appropriate and allowable charges" alluded to in the Grant Officer's Response Brief.

Further, Fort Worth contends that it offered documentary evidence to the Grant Officer pertaining to stand-in costs for the disallowed costs in a timely fashion. Fort Worth appended copies of letters to the Grant Officer relating to these

substitute costs in its Reply Brief. These letters appear to pertain to the Grant Officer's Final Determination Finding 7, while the issue before me pertains solely to Finding 3. It is unclear whether Fort Worth's presentation directly related to the Grant Officer's withdrawal of Finding 7, or if it is appropriate for consideration with regard to Finding 3, as well.

Finally, I find that the state did not exercise due diligence in its oversight responsibilities of FWWC's agreements with its vendors and is not entitled to a waiver of sanctions pursuant section 164(e)(2) of the Act. The state's supervising agency should have been aware of the Department's concern regarding the types of contractual relationships entered into between FWWC and its vendors, and should have initiated appropriate action to warn the parties, if not preclude the continuation of these arrangements.

ORDER

The ALJ's decision is AFFIRMED. The Grant Officer is ORDERED, however, to review such records as are made available by the Complainant and the Complainant/Intervenor to: (1) determine whether there are additional allowable costs which pertain to trainees that completed their requisite training and were successfully placed in unsubsidized employment which should appropriately be credited to the disallowed costs total; (2) determine whether allowable stand-in costs for disallowed costs were timely presented by the Complainant/Intervenor as they contend: and (3) report back to me as to whether other sanctions

provided for by the Act and regulations in lieu of repayment might not more appropriately be levied against the state.

SO ORDERED.

Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: Texas Department of Commerce v. U.S. Department of Labor

Case No. : 90-JTP-5

Document : Final Decision and Order

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